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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

MARGIE MCRAE,	)	No. C 07-1538 SBA
	)	
Plaintiff,	)	
	)	
v.	)	<b>FEDERAL DEFENDANTS'</b>
	)	<b>OPPOSITION TO PLAINTIFF'S</b>
	)	<b>MOTION FOR DEFAULT;</b>
MICHAEL J. ASTRUE, COMMISSIONER	)	<b>DECLARATION OF JONATHAN U.</b>
OF THE SOCIAL SECURITY	)	<b>LEE; [PROPOSED] ORDER</b>
ADMINISTRATION; GEORGE W. BUSH,	)	
PRESIDENT OF THE UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendants.	)	

**I. INTRODUCTION**

Federal Defendants Michael J. Astrue<sup>1</sup>, Commissioner of the Social Security Administration; George W. Bush, President of the United States of America ("Federal Defendants") oppose plaintiff's motion for a default judgment based on the following reasons:

First, plaintiff filed her complaint on March 16, 2007, but she has not served the summons and complaint in accordance with Federal Rule of Civil Procedure 4, which required her to carry out three acts of service, including service on (1) the U.S. Attorney General, (2) the federal

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<sup>1</sup>Plaintiff named Joanne Barnhardt, former Commissioner of the Social Security Administration as defendant. Mr. Astrue is the current Commissioner.

1 agency involved with the subject matter of the dispute, in this case the Social Security  
 2 Administration, and (3) the local U.S. Attorney's Office. Plaintiff has not served the U.S.  
 3 Attorney's Office. Declaration of Jonathan U. Lee, ¶2. Therefore, the time period of 60 days for  
 4 a responsive pleading on behalf of the defendants has not yet begun to run. In fact, because  
 5 plaintiff has not served the complaint, the Federal Defendants filed on July 2, 2007 a motion to  
 6 dismiss for failure to serve, *inter alia*, which will be heard on September 11, 2007. *Id.*, ¶4. The  
 7 motion for default is inappropriate because it is premature, and the Court should dismiss this  
 8 action for failure to serve (unless plaintiff timely cures the defect in service).

9 Second, significantly, plaintiff McRae's pending action is the result of earlier litigation  
 10 between these parties involving these same claims. In the earlier action, Action 06-1999 MJJ,  
 11 the Federal Defendants moved to dismiss for failure to serve because plaintiff did not complete  
 12 the three part action required by FRCP 4. In the motion to dismiss filed on July 2, 2007, Federal  
 13 Defendants detailed this prior litigation history, including plaintiff's filing of sworn statements  
 14 before Judge Jenkins confirming her understanding in late 2006 that FRCP 4 required her to  
 15 serve the local U.S. Attorney's Office before her prior action could move forward.<sup>2</sup> The motion  
 16 for default is inappropriate for the additional reason that plaintiff's representation of service is  
 17 inaccurate and plaintiff knew or should have known the representation is inaccurate.

18 Third, under Federal Rule of Civil Procedure 55(e), "[n]o judgment by default shall be  
 19 entered against the United States or an officer or agency thereof unless the claimant establishes a  
 20 claim or right to relief by evidence satisfactory to the Court." Plaintiff has not provided notice of  
 21 the motion for default, no evidence of service of the complaint, and no substantive evidence to  
 22 support her request, which is required under Rule 55(e). The only basis for the requested default  
 23 offered is the plaintiff's own affidavit under penalty of perjury with the claim she completed  
 24 service when she provided the complaint to Attorney General Arturo (*sic*) Gonzales and SSA

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25  
 26 <sup>2</sup>On July 2, 2007, the Federal Defendants also filed a motion to relate Action 07-1538  
 27 SBA to the earlier Action 06-1999 MJJ because of the similarity of the claims and defenses and  
 28 in the interests of judicial economy. Lee Decl. ¶3. On March 5, 2007, District Judge Jensen  
 signed a 10 page order analyzing plaintiff's claims in light of the Federal Defendants' motion to  
 dismiss for failure to state a claim and for lack of subject matter jurisdiction.

1 Commissioner Joanne Barnhardt (*sic*). As noted above, plaintiff's claim is untrue. Even if the  
2 statement were true, however, Rule 55(e) requires much more of a showing by plaintiff. In light  
3 of plaintiff's prior filings in Action 06-1999 MJJ revealing her understanding that service of the  
4 complaint had to include service on the local U.S. Attorney's Office, the motion for default falls  
5 far short of the standard in Rule 55(e) because there is no evidence to support plaintiff's  
6 substantive claims.

7 Fourth, the record shows that the Court gave plaintiff an opportunity to re-file certain claims  
8 made in the earlier action, Action 06-1999 MJJ. Plaintiff took the step of re-filing her complaint  
9 in accordance with Judge Jenkins' March 5, 2007 Order in the earlier case. As outlined above,  
10 plaintiff did not serve that complaint under the rules governing actions against the federal  
11 government, rules with which plaintiff was familiar. In fact, plaintiff did not contact the U.S.  
12 Attorney's Office from early March 2007 until the present, even though she knew full well that  
13 the undersigned was assigned to defend her claims in Action 06-1999 MJJ. Declaration of  
14 Jonathan U. Lee ¶2. It is anticipated that within the time allotted by the Federal Rules, the  
15 Federal Defendants will file a motion to dismiss the pending action for failure to state a claim  
16 and in the alternative for lack of subject matter jurisdiction. There is no evidence suggesting that  
17 the Federal Defendants have allowed plaintiff's complaint to languish through inattention.

## 18 II. CONCLUSION

19 The Federal Defendants respectfully request that the Court deny plaintiff's motion.

20 DATED: July 3, 2007

Respectfully submitted,

21 SCOTT N. SCHOOLS  
22 United States Attorney

23 /s/  
24 JONATHAN U. LEE  
25 Assistant United States Attorney  
26 Attorneys for the United States of America  
27  
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**DECLARATION OF JONATHAN U. LEE**

I, JONATHAN U. LEE, declare:

1. I am an Assistant United States Attorney in the United States Attorney's Office for the Northern District of California. I am licensed to practice law in California and to appear before this Court. I am the counsel of record in the captioned matter and I am familiar with the pleadings, discovery and files in this action. I make this declaration from my own personal knowledge. If called as a witness, I could and would competently testify to the contents of this declaration.
2. Regarding the pending action, Action 07-1538 SBA, our office has no record of service of the summons and complaint in this case. I have had no communication of any kind from plaintiff McRae since the Court issued orders dated March 5 and April 2, 2007, effectively ending plaintiff's prior action against the Social Security Administration for breach of employment contract and employment discrimination. The net effect of those orders permitted plaintiff to refile some of her claims, which resulted in Action 07-1538 SBA. I learned on July 2, 2007, that plaintiff filed a motion for default judgment last week in which she claimed she properly served the pending complaint. That is not a true statement because our office has not been served. I learned of plaintiff's request for a default because of the fortuitous event that I checked PACER to see if there was any activity involving plaintiff, not because of any notice received from plaintiff. Before early March, I had several communications with plaintiff McRae, including a face to face discussion in August 2006 about the rules for service of a complaint under FRCP 4, and plaintiff acknowledged my role as defense counsel in numerous letters and pleadings filed with the court during the course of Action 06-1999 MJJ.
3. On July 2, 2007, I filed a motion to relate the pending case to the earlier action before Judge Jenkins, Action 06-1999 MJJ. Because the pending case involves the same subject matter, including claims and defenses, and in the interests of judicial economy, I believe the Court should relate the two cases. The motion to relate is before Judge Jenkins, and we provided a courtesy copy to the Court in this action.
4. On July 2, 2007, I also filed a motion to dismiss the pending complaint for defective process

1 under FRCP 12(b)(4) and for failure to serve under FRCP 12(b)(5). That motion is before  
2 this Court on the earliest hearing date available, September 11, 2007.

3  
4 I declare under penalty of perjury that the foregoing is true and accurate and that I have  
5 executed this declaration on July 3, 2007 in San Francisco, California.

6  
7 /s/  
8 JONATHAN U. LEE  
9 Assistant United States Attorney

10  
11 **[PROPOSED] ORDER**

12 For the foregoing reasons, Plaintiff's Motion for Default is DENIED.

13 Dated: \_\_\_\_\_

14 Hon. Sandra B. Armstrong  
15 UNITED STATES DISTRICT JUDGE